No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

MONTANA'S SUR-REPLY

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Statement	1
Summary of Argument	1
Argument	3
I. Article V(A) Protects Montana's Entitlement Based on Pre-1950 Uses	3
A. Wyoming and the United States Ignore the Compact's Protection of Montana's Pre-1950 Entitlement	3
B. Wyoming and the United States Resort to Extrinsic Evidence to Contradict the Plain Language of the Compact	7
C. Wyoming Law Was Not Incorporated into Article V(A), Nor Would It Support the Erosion of Montana's Pre-1950 Rights	11
D. Wyoming's and the United States' Reading of the Compact Would Create an Unworkable Interstate Relationship Contrary to the Purposes of the Compact	16
E. Focus on the Rights of Individual Water Users By Wyoming and the United States is Misplaced	17
F. Wyoming's Divertible Flow Argument is Irrelevant	20

TABLE OF CONTENTS – Continued

Page

II. Wyoming's Duty to Comply With Montana's Pre-1950 Entitlement is Independent of Actions by Montana or Its Water Users..... 21

A. Montana Has Not Waived Its Exception 22

B. The Plain Language of the Compact Does Not Require Montana to Exhaust Intrastate Remedies 23

C. The Allocation is Self-Executing and Does Not Depend on Actions of Individual Users or Administration in the Downstream State 24

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Alabama v. North Carolina, 1305 S.Ct. 2295 (2010) 8

Basin Electric Power Coop. v. State Bd. of Control, 578 P.2d 557 (Wyo. 1978) 13

Bower v. Big Horn Canal Ass'n, 307 P.2d 593 (Wyo. 1957) 14

Fuss v. Franks, 610 P.2d 17 (Wyo. 1980) 14

Green River Development Co. v. FMC Corp., 660 P.2d 339 (Wyo. 1983) 13

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 19

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 8

Nebraska v. Wyoming, 515 U.S. 1 (1995) 18

New Jersey v. Delaware, 552 U.S. 597 (2008) 9

New Jersey v. New York, 345 U.S. 369 (1953) 18

Quigly v. McIntosh, 103 P.2d 1067 (Mont. 1940) 13

R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6, 690 P.2d 823 (Colo. 1984) 15

Rock Creek Ditch & Flume Co. v. Miller, 17 P.2d 1074 (Mont. 1933) 14

Salt River Valley Water Users' Ass'n v. Kovacovich, 411 P.2d 201 (Ariz. App. 1966) 15

TABLE OF AUTHORITIES – Continued

Page

Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., 529 P.2d 1321 (Colo. 1974) 15

Steed v. New Escalante Irrigation Co., 846 P.2d 1223 (Utah 1993) 15

Texas v. New Mexico, 462 U.S. 554 (1983) 3

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 4, 18

Wyoming v. Colorado, 259 U.S. 419 (1922) 9

STATUTES

Wyo. Stat. Ann. § 41-3-101 12

Wyo. Stat. Ann. § 41-3-104 13

Upper Colorado Compact, 63 Stat. 31 (1949) 20

Yellowstone River Compact, 65 Stat. 663 (1951)

Art. I(A) 18

Art. I(B) 19

Art. II(G) 10

Art. II(H) 4, 7, 9

Art. V 2, 5, 6, 7

Art. V(A) ..... *passim*

Art. V(B) ..... *passim*

Art. V(C) 20

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

House Rep. No. 1118, 82d Cong., 1st Sess. (Oct. 10, 1951) 16

Sen. Rep. No. 883, 82d Cong., 1st Sess. 6 (1951) 4

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A. Dan Tarlock, *Law of Water Rights and Resources* (Thomson Reuters/West 2009) 9

Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy and Robert H. Abrams, *Legal Control of Water Resources* (Thomson/West 2006) 10, 13

Robert E. Beck & Eugene Kuntz, *Reallocations, Transfers, and Changes*, in *Waters and Water Rights*, at 14-54 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) 13

South Carolina v. North Carolina, No. 138 Orig., *Brief for the United States as Amicus Curiae in Support of Plaintiff's Exceptions* (Feb. 2009) 18

STATEMENT

This is a suit brought by Montana to require Wyoming to comply with its obligations under the Yellowstone River Compact ("Compact"). The Compact was entered into by three States with the approval of Congress. The Compact distinguishes between uses existing as of January 1, 1950 ("pre-1950") and uses initiated after January 1, 1950 ("post-1950"). The Special Master's First Interim Report ("FIR") addresses the extent to which Montana's Bill of Complaint states a claim under Article V(A) of the Compact.

Montana has filed an Exception ("Mont. Br.") questioning two legal conclusions of the FIR. The Northern Cheyenne Tribe has filed a brief *amicus curiae* in support of Montana's Exception ("N. Cheyenne Br."). The State of Wyoming and the United States, as *amicus curiae*, have filed briefs ("Wyo. Br." and "U.S. Br.") opposing Montana's Exception.

SUMMARY OF ARGUMENT

The Yellowstone River Compact is a treaty among States approved by Congress, not an agreement among individual water users. It incorporates a complete apportionment of the waters of the Yellowstone River System, subject to express exceptions, which is fixed with respect to pre-1950 uses. The Compact incorporates direct consumptive use limits, without which its purpose of allocating the waters would be

unachievable. Contrary arguments based on divertible flow methodologies are not relevant to the fundamental principle that one State may not deplete water allocated to another State under the Compact. The Compact is largely complete unto itself and does not require extensive resort to extrinsic sources of law.

Montana's Exception is focused on protection of Montana's Article V(A) pre-1950 entitlement. Article V(A) requires that Montana receive the same amount of water that Montana would have received for its uses as of January 1, 1950, under the same water supply conditions.

As to the second part of Montana's Exception, the Special Master erred in holding that Wyoming's Compact obligations are contingent on Montana's actions. No language in the Compact supports such a condition precedent, and it would be contrary to the structure of Article V, which creates rights in the signatory States, not in individual water users.

Montana has not waived this argument, and the issue is ripe for resolution. However, Montana does not object to the United States' suggestion that it be deferred for later resolution.

ARGUMENT

I. Article V(A) Protects Montana's Entitlement Based on Pre-1950 Uses

A. Wyoming and the United States Ignore the Compact's Protection of Montana's Pre-1950 Entitlement

Wyoming and the United States focus on Wyoming's rights under the Compact and ignore Montana's.[1] They argue that Article V(A) incorporates Wyoming law, which, they assert, allows Wyoming water users to increase their depletions and thereby diminish or eliminate their return flows to the river. Wyoming and the United States essentially fail to address the effect of their position on Montana's pre-1950 entitlement. Article V(A), however, expressly

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[1] The United States suggests that "Montana could sue in this Court for an equitable apportionment of pre-1950 water rights." U.S. Br. 15 n.7. This statement neglects the fact that the Compact has already apportioned all the waters of the Tongue and Powder Rivers and the rule that "no court may order relief inconsistent with [a compact's] express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The United States also misstates Montana's claim. "Montana contends that it is entitled to satisfy all of its pre-1950 rights before Wyoming does, such that Wyoming would be the first to bear the burden of any shortfall so severe as to affect pre-1950 users as well as post-1950 users." U.S. Br. 15-16 n.7. To the contrary, Montana has taken just the opposite view. See Bill of Complaint, ¶ 8 ("Wyoming refuses to curtail consumption of the waters of the Tongue and Powder Rivers *in excess of Wyoming's consumption of such waters existing as of January 1, 1950*") (emphasis added).

provides for and protects the pre-1950 allocations of *both* States.

Further, Article V(A) expressly provides that Montana "shall continue to enjoy" its pre-1950 water supply. This mandatory provision of Article V(A) is violated if Montana is no longer allowed to receive the water that supplied its users' water rights as of January 1, 1950. See Sen. Rep. No. 883, 82d Cong., 1st Sess. (1951), at 2, Joint App. 13 (explaining that uses of the basin were recognized and protected from "a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion"). Neither Wyoming nor the United States explains how their view can be squared with Article V(A).

The interpretation advanced by Wyoming and the United States ignores the term "beneficial uses" in the first phrase of Article V(A) and the definition of that term in Article II(H). Instead, Wyoming and the United States focus on the words "appropriative rights" as their basis for arguing that Article V(A) incorporates the Wyoming doctrine of appropriation. Yet Article V(A) does not expressly incorporate the law of Wyoming to determine Montana's Compact rights. It would be an anomaly among interstate water compacts if it did, and it would be an anomaly for this Court to so hold. Cf. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for

a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States").

Article V(A) applies to (1) "Appropriative rights to" (2) "the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950." Although Wyoming and the United States emphasize (1) "appropriative rights" over (2) "beneficial uses," to do so is inconsistent with the structure of Article V as a whole. As will be seen, *both* terms must be satisfied. Article V divides all the waters of the Interstate Tributaries between the Article V(A) portion: "Appropriative rights to the beneficial uses of the water . . . existing in each signatory State as of January 1, 1950;" and the Article V(B) portion: "the unused and unappropriated waters . . . as of January 1, 1950."[7] The two parts of the "pie" differ according to whether the water was "unused and unappropriated" as of January 1, 1950 or not. Thus, to fully complement Article V(B), Article V(A) must apply to all waters that, as of January 1, 1950, were *both* "used and appropriated." Moreover, it is the more plausible reading of Article V(A) that the term "Appropriative rights to the beneficial uses of waters" means that Article V(A) applies to waters that were *both* appropriated *and* beneficially used as of January

[7] No exception has been taken to the Special Master's ruling that Articles V(A) and V(B) together allocate all of the waters of the Interstate Tributaries. FIR 10-11.

1, 1950. In turn, "beneficial use" is limited to the amount of water depleted. See *infra*, Section I.B.

Wyoming and the United States argue that the Wyoming doctrine of appropriation, described by the United States as "a somewhat dynamic concept," is incorporated into Article V(A). In other words, they argue that the allocation among the States is not fixed, but changes based on the actions of individual water users. The United States gives two examples of the "dynamic" nature of the doctrine of appropriation: (1) loss by abandonment of a water right, and (2) increased use under an existing water right.[1] U.S. Br. 23. Neither of these changes is recognized by Article V of the Compact, however. To do so would run afoul of the structure of Article V. As described above, Article V(A) and Article V(B) together allocate all of the waters of the interstate tributaries *as of January 1, 1950*. That is, the allocation is made based on the status of the waters, as used-and-appropriated or not, as of a single date, January 1, 1950.

While individual water rights can continue to be bought and sold and physically transferred within each State (*i.e.*, "continue to be enjoyed in accordance with the laws governing the acquisition and use under the doctrine of appropriation"), such changes cannot alter the allocations set by the Compact as

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[1] The Special Master rejected this second example as a possibility under Article V(A). FIR 62 n.10. No exception has been filed to that ruling.

between the States without destroying the symmetry of Article V. For example, the abandonment of a pre-1950 water right in Wyoming at a point in time after January 1, 1950 would create an anomalous situation under Article V: The water that had been subject to the abandoned water right, which was both appropriated and being used as of January 1, 1950, would no longer fit within either Article V(A) or Article V(B). Instead a new, unrecognized category would be created for water that was previously appropriated and in use as of January 1, 1950, but unappropriated and unused at some point after January 1, 1950. This result is incompatible with the structure of Article V, which provides no way to convert V(A) water to V(B) water.

B. Wyoming and the United States Resort to Extrinsic Evidence to Contradict the Plain Language of the Compact

As Montana explained in its opening brief, Article V(A) protects Montana's right to "continue to . . . enjoy [ ]" its "appropriative rights to the beneficial uses of water" existing in Montana as of January 1, 1950. FIR, at A-7; Mont. Br. 16-20. "Beneficial Use" is defined as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H), FIR, at A-4.

Both Wyoming and the United States essentially disregard the Compact's definition of "beneficial use," turning instead to perceived prior appropriation

"principles of water law." U.S. Br. 10. It is on these asserted principles of "western water law," Wyo. Br. 17, that Wyoming and the United States would have the Court rely in construing Article V(A) and the term "beneficial use." See Wyo. Br. 20; U.S. Br. 18-19. The United States goes so far as to suggest that Montana bears the burden of showing that the Compact "override[s]" the law of prior appropriation. U.S. Br. 10-11, 17. But this approach turns on its head the fundamental rule of statutory interpretation that a court will look first to the plain language of the statute, and will resort to extrinsic sources only if that language is ambiguous. See, *e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well" (citations and internal quotation omitted)). Reliance on extrinsic law is misplaced here because the text of Article V(A) is unambiguous, and the Court need not look to extrinsic evidence to inform the defined Compact term of "beneficial use." See, *e.g.*, *Alabama v. North Carolina*, 130 S.Ct. 2295, 2305-2308 (2010).

Wyoming argues that the Compact definition of beneficial use "simply recognized the principle of appropriative rights doctrine that only water applied for beneficial purposes or 'uses' should be given state-sanctioned status." Wyo. Br. 20; see also *id.*, at 22. Likewise, the United States asserts that "the Compact's definition of '[b]eneficial [u]se' fits with what

was already the law in both Montana and Wyoming: that state-law water rights, and hence the first tier of the Compact, will not protect water diversions for a non-beneficial use." U.S. Br. 19. This construction renders the Compact's reference to "beneficial uses" superfluous and suggests a fundamental question: Why would the States expressly define "beneficial use" if they intended the reference to the "doctrine of prior appropriation" to import a different definition?

Under prior appropriation law, water can only be appropriated for a beneficial use, and beneficial use is necessary to hold an appropriative right. See, *e.g.*, *Wyoming v. Colorado*, 259 U.S. 419, 459 (1922); A. Dan Tarlock, *Law of Water Rights and Resources* § 5:66 (Thomson Reuters/West 2009). Wyoming and the United States suggest that the term "beneficial uses" in Article V(A) has the same meaning as under prior appropriation law, namely, the type of use to which water is put. However, Article V(A) references "appropriative rights to the beneficial uses of water," and the term "appropriative rights" already encompasses the prior appropriation doctrine meaning of beneficial use. Thus, this construction would render the explicit reference to "beneficial uses" in Article V(A), as well as the Article II(H) definition of that term, superfluous, a construction that is strongly disfavored. See, *e.g.*, *New Jersey v. Delaware*, 552 U.S. 597, 611 (2008) (not to attribute specific meaning to a specific term "would deny operative effect to each word in the Compact, contrary to basic principles of construction"). Therefore, a reading of the Compact that

refuses to recognize the unique reference to depletions in the definition of "beneficial use" is not viable.[4]

The United States argues that the term "deplet[ion]" in the Compact definition of beneficial use actually refers to the requirement that an appropriator "remove [the] water from the stream." U.S. Br. 20. The United States thereby argues that the term "deplet[ion]" was intended to have the same meaning as "diversion." But this is contrary to the commonly accepted notion of diversion. See Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, Robert H. Abrams, *Legal Control of Water Resources* 1082 (Thomson/West 2006) (defining "diversion" as "[t]he extraction of water from its natural source"). There is no textual support for this theory. In fact, the language of the Compact supports the opposite conclusion – the definition of "Diversion" incorporates the concept of depletion. ("'Diversion' mean[s] the taking or removing water from [the stream] when the water so taken is not returned directly into the channel of the [stream]"). Art. II(G), FIR, at A-4; N. Cheyenne Br. 5. Nor is that theory supported by the doctrine of prior appropriation, which traditionally distinguishes diversions from depletions. See, *e.g.*,

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[4] The United States' argument that "[t]he reference to 'deplet[ion]' in the Compact is properly read to refer to the venerable water-law principle that, to acquire a property right to use water, the appropriator must remove that water from the stream," suffers from this same defect, failing to give the term "deplet[ion]" independent meaning from the term "diversion." U.S. Br. 20.

FIR 60-61 (distinguishing diversion of water from consumptive use).

In support of this argument, the United States suggests that "water that is lost during irrigation has long been deemed to be part of the water that the irrigator puts to 'beneficial use' and, thus, part of the appropriative right." U.S. Br. 21. But that is precisely Montana's point: the amount of water that was depleted based on pre-Compact technologies, *i.e.*, actually used, defines the rights that were locked in by Article V(A) – no less, no more.

C. Wyoming Law Was Not Incorporated into Article V(A), Nor Would It Support the Erosion of Montana's Pre-1950 Rights

The United States suggests that Montana has conceded that "under Wyoming law, the irrigator's (pre-1950) appropriative right includes the right to reap the benefit of any efficiency gains himself." U.S. Br. 16.[5] That is incorrect. As explained in Montana's opening brief, the doctrine of appropriation in Wyoming and throughout the West prohibits an appropriator from increasing his depletions to the detriment of downstream users. Mont. Br. 31-37.

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[5] The United States does not provide a citation for this assertion.

The Special Master, Wyoming, and the United States rely on "*Wyoming's* law of prior appropriation concerning increased irrigation efficiencies" to conclude that Wyoming may increase its depletions on pre-1950 irrigated acreage to the detriment of Montana's Compact rights. U.S. Br. 9 (emphasis added). As explained above, the Compact adopts a permanent allocation between the States. Even if the Compact does adopt a changing allocation based on an evolving concept of the prior appropriation doctrine, which Montana denies, Montana does not believe Wyoming or Montana law supports the Special Master's conclusion.

Contrary to the implication by Wyoming and the United States, a plain reading of the Compact as placing a quantitative limit on depletions in both States as of 1950 is consistent with the doctrine of appropriation. Indeed, the Special Master's understanding of "beneficial use" in Article V(A) as being *non*-quantitative, see FIR 61, is hard to reconcile with Wyoming's own statutory definition of beneficial use as the "basis, measure, and limit of the right to use water." Wyo. Stat. Ann. § 41-3-101.[6] What words could be used to convey more concretely that beneficial use is a quantitative, limiting concept?

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[6] Wyoming's definition of beneficial use is consistent with the quantitative understanding of the concept of beneficial use generally in the western states. See, *e.g.*, U.S. Br. 18 (and cases cited therein) ("the first person to appropriate water for a beneficial use gains a right . . . only to the *extent* of its actual use") (internal quotation marks omitted; emphasis added).

Moreover, the quantity of water that is protected is the amount that was historically consumed. See, *e.g.*, Robert E. Beck & Eugene Kuntz, *Reallocations, Transfers, and Changes*, in *Waters and Water Rights*, at 14-54 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) ("An appropriator may not increase, through reallocation or otherwise, the actual historic consumptive use of water to the injury of other appropriators"). It is for this reason that, when transferring a water right, the right is limited to the "historic amount consumptively used," that does not "decrease the historic amount of return flow under an existing use," and that does not "injure in any manner other lawful appropriators." Wyo. Stat. § 41-3-104 (1977); see also *Green River Development Co. v. FMC Corp.*, 660 P.2d 339 (Wyo. 1983); *Basin Electric Power Coop. v. State Bd. of Control*, 578 P.2d 557 (Wyo. 1978).

The reason transfers are limited to the amount historically consumed is to protect downstream users, who are entitled to the continuation of the stream conditions that existed at the time they commenced their appropriations. See, *e.g.*, Sax, et al. at 270-271; *Quigly v. McIntosh*, 103 P.2d 1067, 1072 (Mont. 1940). The Compact incorporates this principle of prior appropriation law in Article V(A) and the definition of "beneficial uses." Like the historic consumptive use doctrine, Article V(A) protects both Wyoming, by allowing it the continued enjoyment of the water that was in actual use in 1950, and Montana, by

preventing Wyoming from expanding its use beyond what was historically consumed (*i.e.*, "depleted") in 1950.

Wyoming does not quarrel with the protections afforded by the no-injury rule or the historic consumptive use doctrine. Wyo. Br. 38-39. Instead, Wyoming argues that it should nonetheless be allowed to increase its depletions to Montana's detriment because once water is in the possession of an appropriator "the public loses the right to make claim to it as long as it remains in the possession of its owner." Wyo. Br. 43. As Montana has explained, however, there is a critical difference between waste water (sometimes referred to as seepage) and return flows. Montana claims rights to return flow, not waste or seepage. The Special Master acknowledges that "once 'seepage' water makes it to a natural waterway . . . most states permit water users to divert and appropriate the water from the waterway." FIR 72. Both Montana and Wyoming law are in accord. See *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1077 (Mont. 1933) ("Where vagrant fugitive waters have reached a natural channel, and thus have lost 'their character as seepage, percolating, surface or waste waters,' they serve to constitute a part of the water course, and are subject to appropriation."); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600, 602 (Wyo. 1957) (recognizing "the importance of protecting water rights based upon return flows" as opposed to waste or seepage); *Fuss v. Franks*, 610 P.2d 17, 20-23 (Wyo. 1980) (finding that plaintiff had

a valid and vested right to water because it was return flow that had reached a natural stream).

In the analogous case of *Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1993), the court addressed a suit for an injunction by the downstream appropriator to prevent the upstream appropriator from reducing flows by converting from flood to sprinkler irrigation. *Id.*, at 1224. In analyzing the case, the *Steed* court applied the very principles that Montana advocates here. The court denied the injunction because the water at issue was found to be seepage water that did not return to the same stream from which it had been diverted. *Id.*, at 1226-1227. Application of these same principles yields a different result in the present case, however, because Montana claims water that historically has returned to the same stream system from which it was diverted by Wyoming. Compare *id.* with Bill of Complaint, ¶¶ 12-13. Courts that have considered similar issues have found that a water user may not enlarge a senior right by means of a new salvage technique. See *Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201 (Ariz. App. 1966) (denying the expansion of a senior water right achieved by more efficient irrigation methods); *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1974) (water saved by removing streamside phreatophytes could not be retained because it was relied upon and appropriated by junior users); *R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6*, 690 P.2d 823 (Colo. 1984) (denying expansion of senior water right

to include water saved in draining a 3,000 year old peat bog because the water belonged to the stream and was subject to appropriation).

D. Wyoming's and the United States' Reading of the Compact Would Create an Unworkable Interstate Relationship Contrary to the Purposes of the Compact

One of the purposes of the Compact is to "remove all causes of present and future controversy," but the reading of the Compact by Wyoming and the United States would greatly increase the potential for controversy and create an unworkable interstate relationship. The theory of Article V(A) advanced by the United States and Wyoming would add the burden of continually determining the quantity of water allocated to pre-1950 water rights as they evolve over time. For instance, new controversies would regularly arise between the States over whether pre-1950 water rights had been abandoned or had increased their consumption.[7] In fact, those

[7] The fact that the drafters did not quantify existing rights does not mean that the Compact affords no protection for Montana's rights. See U.S. Br. 14. Rather, the States were driven to produce a workable agreement as early as possible to take advantage of potential federal projects. House Rep. No. 1118, 82d Cong., 1st Sess. (Oct. 10, 1951), at 2, 5; Joint App. 26, 29.

[8] The only recourse for those disputes would be in this Court.

issues would also have to be determined in order to calculate each State's Article V(B) allocation. The need for continual re-quantification of each State's allocation would unavoidably increase controversy to an intolerable degree, contrary to the stated intent.

E. Focus on the Rights of Individual Water Users By Wyoming and the United States is Misplaced

The Compact is an agreement among the States, not among individual water users. Despite generally recognizing this principle, see U.S. Br. 24 n.11, Wyoming and the United States continue to base their arguments on the premise that the Compact "provides enforceable protection to the *pre-1950 water users in each State*," but, apparently, not to the States themselves. *Id.*, at 11. The argument is best summarized by the United States' statement that "the States are . . . bound by the rights of their water users." *Id.*, at 24 n.11.[*] The consequence of the United

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[*] In contrast, in a recent case before this Court, the United States took a divergent view:

> "[I]n an equitable-apportionment action, *the competing States are advancing sovereign interests rather than proprietary interests or interests that derive from individual water users*. That is why those disputes, unlike other types of original action, are 'resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.'"

(Continued on following page)

States' view is stunning: the allocation among the States would be subject to continual change depending upon the unilateral actions of individual users in both States.

An interstate compact endorsed by congressional consent is in essence a treaty between quasi-sovereign States. See, *e.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951). In entering the Compact, Montana was acting in its sovereign capacity. See Art. I(A). And in bringing this case, Montana was protecting its sovereign rights to the water of the Yellowstone River. See, *e.g.*, U.S. Invitation Br. 11-12.

A primary purpose of the Compact was to "provide for an equitable division and apportionment" of the waters of the Yellowstone River and its tributaries. Preamble, FIR, at A-1. But under Wyoming's and the United States' view, no such division and apportionment was made. Rather the allocation is varied based on the unilateral actions of individual water users. Wyoming and the United States thereby take the remarkable position that the relative rights between the quasi-sovereign States are determined by the actions of individuals who generally cannot even be parties to this action. See *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (explaining that

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South Carolina v. North Carolina, No. 138 Orig., *Brief for the United States as Amicus Curiae in Support of Plaintiff's Exceptions* (Feb. 2009) (quoting *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995)) (emphasis added).

individual water users normally may not participate in interstate water disputes in the original jurisdiction because they have a personal interest only in the "intramural dispute over the distribution of water within the [State]").

The view that the States' Compact rights are dependent on the actions of individual rights is also inconsistent with Article I(B). That Article specifies that the rights of all appropriators in either State "shall be subject to the terms of this Compact." FIR. at A-2 to A-3. This language indicates an intent to subjugate the individual rights to the States' Compact rights, as is consistent with this Court's decision in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Wyoming dismisses *Hinderlider* as "irrelevant." Wyo. Br. 15 n.3. And the United States takes the radical view that "in this case the States are also bound by the rights of their water users." U.S. Br. 24 n.11. But this is not so. Rather *Hinderlider*, decided during the period when the Yellowstone Compact was being negotiated, explains that a compact apportionment "is binding upon the citizens of each State and all water claimants, even where [as here] the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 106. The Compact should be read in harmony with this principle such that Article V(A) is understood to establish the binding allocation to each State for pre-1950 actual uses.

F. Wyoming's Divertible Flow Argument is Irrelevant

Wyoming argues that the Compact's utilization of the "divertible flow" principle forecloses Montana's Exception. Wyo. Br. 22-31. The description of the Compact as a "divertible flow" compact, however, has no bearing on the issue before the Court. As the Special Master explained, "[b]y the terms of the Compact ... the cumulative divertible-flow approach of Articles V(B) and V(C) applies only to the 'quantity of water subject to the percentage allocations' in Article V(B) – *i.e.*, to new uses." FIR 29 (quoting Compact, Art. V(C)). Wyoming has not excepted to this ruling, and it is now the law of this case to which Wyoming can no longer object. U.S. Br. 12 n.4. Thus, the "divertible flow" principle relied upon by Wyoming does not apply to Article V(A), which is the operative provision at the heart of Montana's Exception.

According to Wyoming, the Yellowstone Compact, unlike the Upper Colorado Compact, does not allocate a "fixed amount of water" for delivery to Montana. Wyo. Br. at 20. But contrary to Wyoming's assertion, Montana does not claim that Wyoming is obliged to deliver a fixed quantity of water to Montana under Article V(A). In times of shortage, Wyoming has no obligation to curtail its own pre-1950 actual use (depletions). However, when water is short, and Montana is not receiving its full Article V(A) allocation, Wyoming violates the Compact by depleting more water than was in actual use in 1950. That proposition has nothing to do with the selection of

"divertible flow" over "consumption" as the basis for allocating the unused and unappropriated water in Article V(B). Nor does the distinction advocated by Wyoming change the fundamental principle that all of the waters of the Tongue and Powder Rivers were apportioned and allocated by the Compact and that one State may not deplete the waters allocated to another State.

II. Wyoming's Duty to Comply With Montana's Pre-1950 Entitlement is Independent of Actions by Montana or Its Water Users

The Special Master has recommended denial of Wyoming's Motion to Dismiss, but has conditioned Montana's relief under the Compact upon exhaustion of intrastate remedies. FIR 27-28, 89. This recommendation has the potential to affect future litigation and administration of the Compact insofar as it allows Wyoming to require Montana to prove certain facts prior to Wyoming being required to meet its delivery obligations under Article V(A). Montana has taken exception to this ruling because Wyoming's Compact obligations are not dependent on the actions of individual users, priority administration in Montana, or any other action or lack of action by Montana. Nonetheless, Montana is amenable to the United States' suggestion that a ruling be deferred.

A. Montana Has Not Waived Its Exception

In Case Management Order No. 2, the Special Master invited the parties to file letter briefs addressing corrections or clarifications to the Memorandum Opinion of June 2, 2009. The Order directed that the letter brief "is not an opportunity to rebrief Wyoming's Motion to Dismiss, and the letter briefs should not cover matters already addressed in the briefs filed on that motion." 6/12/09 Order; see also 6/11/09 Tr. 18, 20-21. The Special Master limited the parties' letter briefs to corrections or clarifications of fact or law, including state law as discussed in the Memorandum Opinion. Montana interpreted this instruction to mean that the Special Master did not want substantive argument on his recommendations, but rather, wanted to ensure his discussion of the law and facts was accurate. The wording of the Special Master's invitation to file the letter briefs refutes Wyoming's assertion that Montana waived its right to bring an exception.

Moreover, in response to the Special Master's suggestion that Montana must first resolve water shortages among its own water users, Montana submitted comments stating: "The issue is compact rights between States, not relative rights of individual water users," and "Wyoming is required by the Compact to comply with Article V(A) without a specific call from Montana." See Comments of Montana on the Draft First Interim Report of the Special Master (Jan. 1, 2010).

B. The Plain Language of the Compact Does Not Require Montana to Exhaust Intrastate Remedies

The Special Master's conclusion finds no support in the text of the Compact. To the contrary, Article V(A) requires that Montana's pre-1950 rights "continue to be enjoyed," and the Special Master has correctly concluded that this language places an affirmative obligation on Wyoming to curtail its post-1950 uses when necessary to deliver sufficient water at the border to supply Montana's pre-1950 entitlement. There is no specific language imposing an obligation to exhaust intrastate remedies.

Perhaps recognizing the absence of a textual anchor in the Compact for their argument, Wyoming and the United States fall back on the mistaken conclusion, discussed above, that the Compact affords rights to individual water users and that "when . . . an intrastate remedy is available for the injury to a Montana water user, that user cannot attribute his injury to Wyoming, or to a Compact breach." U.S. Br. 31. As Montana demonstrates above, the premise of this argument is simply wrong. The Compact creates rights among States, not individual water users.

C. The Allocation is Self-Executing and Does Not Depend on Actions of Individual Users or Administration in the Downstream State

The Compact is a federal law designed to protect existing uses in all three signatory states, and to allocate any leftover water of the Interstate Tributaries on a percentage basis. Article V(A) says nothing about how existing rights are administered within each State; its only requirement is that each State will not interfere with the supply necessary to satisfy pre-1950 users. The Special Master recognized this obligation regarding pre-1950 rights in his First Interim Report by stating: "Protection of pre-1950 appropriations under Article V(A) . . . requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana." FIR 29.

Wyoming's obligation to deliver a supply sufficient to meet pre-1950 uses in Montana is not dependent on Montana having employed any particular method of administration or priority system within its borders. By the same token, Montana may not insist that Wyoming employ any particular method of administration or priority system to satisfy its compact obligations. Wyoming may release storage water, curtail certain uses, limit groundwater pumping, or choose whatever means it sees fit to ensure that Montana's pre-1950 needs are met. But nothing

in the Compact requires Montana, as a downstream State, to pursue intrastate remedies before it may enforce its right to receive water under the Compact.

CONCLUSION

Montana's Exception should be granted in its entirety. In the alternative, the Court may simply wish to defer its ruling on one or both issues, so long as Montana's rights are preserved in the meantime. Following this Court's consideration, the Court should remand the case to the Special Master for further proceedings.

Respectfully submitted,

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